INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The findings and conclusions of the district court (App. A) are not reported.

JURISDICTION

The judgment of the district court (App. B) was entered on December 12, 1973. A notice of appeal to this Court (App. C) was filed on February 7, 1974. On March 1, 1974, Mr. Justice Douglas extended the time for docketing an appeal until May 11, 1974. The jurisdiction of this Court is conferred by Section 2 of

the Expediting Act (15 U.S.C. 29). *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526.

QUESTION PRESENTED

Whether a corporation which performs janitorial and maintenance services within a single state for companies which sell products in interstate and foreign commerce, which solicits and negotiates such contracts through interstate communications, and which purchases substantial quantities of supplies originating in other states, is "engaged in commerce" for purposes of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, provides in pertinent part:

> "Commerce", as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The United States instituted this civil antitrust suit against American Building Maintenance Industries ("ABMI") on January 8, 1971, contending that ABMI violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring the stock of J. E. Benton Management Corp. and by merging Benton Maintenance Company into American Building Maintenance Company of California. The complaint alleged that the merger and acquisition, which was consummated in 1970, may substantially lessen competition in the sale of janitorial services in Southern California and the Los Angeles area.[1] On December 12, 1973, the district court granted the defendants' motion for summary judgment, holding that neither of the Benton com-

[1] The complaint defines "Southern California" as Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino and Riverside Counties.

panies was "engaged in commerce" within the meaning of Section 7 of the Clayton Act at the time of the merger and acquisition.

A. THE ACQUIRING COMPANY AND THE INDUSTRY

American Building Maintenance Company of California is a wholly owned subsidiary of ABMI. The complaint alleged that ABMI is the largest seller of janitorial services in Southern California and one of the largest sellers of such services in the country. It has 56 janitorial service branches serving 500 communities in the United States and Canada. The complaint alleged that ABMI had national revenues of about $52.4 million and Southern California revenues of about $10.9 million from janitorial services in 1969. ABMI's Southern California sales represented about 10 percent of the total janitorial service sales in that area.

The service industries are the fastest growing segment of the American economy. More than half of the nation's work force is employed in those industries and soon more than half of this country's Gross National Product will be generated in the service sector. The supplying of janitorial services by independent contractors is one of the fastest growing service businesses. Receipts for such services increased by 324 percent from 1958 to 1967. In 1972, national receipts for commercial, institutional and industrial cleaning services were more than $1 billion (Aff. of Philip Neff).

There is a nationwide trend toward concentration in the janitorial service industry. The four largest

firms have made at least 170 acquisitions of janitorial service and related businesses since 1961. ABMI made 54 of those acquisitions. ABMI's acquisitions included five janitorial service companies in the Los Angeles area in addition to the Benton companies (Aff. of John D. Gaffey).

ABMI has publicly acknowledged that it intends to accelerate this acquisition program. In a December 1971 speech to institutional investors, ABMI's president stated: "We have been buying four-six companies a year. I would say in the future it would be fair to estimate that we will buy between six and eight companies a year" (Aff. of John D. Gaffey).

B. THE ACQUIRED COMPANIES

Jess E. Benton, Jr. owned all of the stock of J. E. Benton Management Corp. and 85 percent of the stock of Benton Maintenance Company at the time of the merger and acquisition (Aff. of Jess E. Benton, Jr.). Both companies sold janitorial services; Benton Management also provided building management services and engaged in the real estate business. All of the facilities served by these companies were located in Southern California. The complaint alleged that the Benton Companies ("Benton") was the fourth largest seller of janitorial services in Southern California, with 1969 sales of about $7.2 million. This represented about 7 percent of the total sales in that area.

C. BENTON'S OPERATIONS

Benton's customers included TRW, Inc., Jet Propulsion Laboratory, Rockwell International, General

Telephone Co. of California, Pacific Telephone and Telegraph Co., Mobil Oil Corp., Union Oil Co., Texaco, Inc., Carnation Co., Teledyne, Inc. and Tishman Realty & Construction Co. Benton maintained and cleaned offices, manufacturing areas and laboratories for its aerospace customers, offices and rooms housing telephone switching equipment for its telephone company clients, corporate headquarters buildings for Union Oil, Carnation and Teledyne, and regional headquarters buildings for Mobil and Texaco.[2] Benton also performed all the janitorial services for the owner and tenants at Tishman Plaza, a large office complex in the Los Angeles area (Aff. of Alan D. Levy).

In some cases Benton's activities were confined to cleaning services, in other cases it assumed responsibility for maintaining heating, air conditioning, electrical and plumbing services, and paid utility bills for Texaco (Aff. of Edward H. Patotzka).

Although all of Benton's maintenance contracts were performed in California, some of the contracts were negotiated with out-of-state owners. The Tishman Plaza contract was executed by Tishman executives based in New York (Aff. of Alan D. Levy), and the New York Life Insurance contract was the product of interstate negotiations. Those two contracts

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[2] Affidavits of Charles V. Engle (TRW); Raymond Hernardez (Jet Propulsion Laboratory); Charles W. Moxley and John Blain (Rockwell); Donald E. Del Dosso (General Telephone); George G. Guest (Pacific Telephone); John Stover (Mobil); L. B. Higbee (Union Oil); Edward H. Patotzka (Texaco); Maynard Heider (Carnation); and Edmund Sakowicz (Teledyne).

made a significant contribution to Benton's total revenue.[3] Benton also used interstate communications to solicit other contracts (Aff. of John D. Gaffey).

Benton purchased substantial quantities of janitorial supplies and other goods manufactured outside of California. In 1969 Benton purchased more than $120,000 in janitorial supplies which were manufactured outside California[4] and paid about $36,000 in lease fees attributable to vehicles and a computer which were manufactured in other states (Aff. of John D. Gaffey).[5]

D. THE SUMMARY JUDGMENT PROCEEDINGS

ABMI filed a motion for summary judgment together with proposed findings of fact and conclusions of law. After receiving memoranda, affidavits and counter-affidavits from both parties and hearing oral argument, the district judge signed the findings and conclusions which ABMI had submitted.

The court found that the Benton companies conducted their businesses entirely within California, that Benton did not advertise nationally. The court

[3] The details of these transactions are contained in exhibits covered by the district court's protective order of June 2, 1971.

[4] The district court findings focused only on Benton's direct interstate purchases which were admittedly small. The court found direct purchases aggregating approximately $140 and interstate telephone calls of $19.78 (Finding 7, App. A, pp. 16–17; Finding 15, App. A, p. 18). The findings do not reflect Benton's purchases of out-of-state products from local distributors, which as noted in the text, were substantial.

[5] Benton also expended about $80,000 of funds advanced by clients for gas, water, electricity and elevator parts which originated outside of California (Affidavits of John D. Gaffey, James J. Breen).

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also found that Benton's purchases of produc "which were shipped to it from outside California and its expenditures for interstate telephone cal were *de minimus*. (App. A, pp. 17, 18) The court co cluded that each Benton company "was not a corpora tion engaged in commerce" and that "[t]here is no juri diction of the Federal Court in this action under Sectio 7 of the Clayton Act (15 U.S.C. § 18)" (App. A, p. 20)

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question involv ing the reach of Section 7 of the Clayton Act. Tha section prohibits anticompetitive acquisitions of co porations "engaged in commerce." The questio is whether Section 7 applies to acquisitions o firms which, although conducting primarily a loca business, nevertheless serve customers who them selves are engaged in interstate commerce, an which, in providing such services, make substantia purchases of goods shipped in interstate commerc The district court's narrow interpretation of the reac of Section 7 is inconsistent with the basic congres sional purpose reflected in that section of arrestin in their incipiency anticompetitive trends towar concentration, and would seriously weaken the effe tiveness of that section in accomplishing that purpos

This Court has already recognized the importanc of the issue. One of the questions which it agreed t review when it granted the petition for certiorari i

Gulf Oil Corp. v. *Copp Painting, Inc.*, No. 73-1012 [granted March 25, 1974], involves the applicability of Section 7 to the acquisition of a company which produces and sells intrastate asphalt that is used on interstate highways.[6] The present case involves a similar question concerning the reach of Section 7. We believe that it would be appropriate for the Court to consider the two cases together, which would enable it to examine the reach of the statute in related but different factual settings.

1. This Court has recognized that in enacting the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." *United States* v. *South-Eastern Underwriters Assoc.*, 322 U.S. 533, 558. Accordingly, the Sherman Act has been applied to all activities which substantially affect interstate commerce. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219. We sub-

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[6] The question states in relevant part:

> With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state, does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law.
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> * * * * *
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> (c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce", and that "the effect * * * may be substantially to lessen competition or tend to create a monopoly," where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?

mit that Section 7 of the Clayton Act, which was designed to provide "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317), was intended to have a similar reach.

The Court of Appeals for the Third Circuit has recognized that when Congress originally enacted Section 7 of the Clayton Act in 1914, it intended that provision to have just as broad a reach as the Sherman Act. In *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 166, the court said:

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

While the legislative history of the original Section 7 does not contain an extended discussion of the "commerce" requirement, it does indicate that Congress intended fully to exercise its commerce power. The "engaged in commerce" language of Section 7 and

the definition of commerce in Section 1 of the Clayton Act, 15 U.S.C. 12, were part of the original bill reported by the House of Representatives Judiciary Committee. The House Report stated that the "definition of commerce * * * is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts." H. Rep. No. 627, 63rd Cong., 2d Sess., p. 7. The Report also said that Section 8, which became Section 7, "* * * is intended to eliminate this evil [the aggregation of economic power through stock acquisition] so far as it is possible to do so * * *." *Id.* at 17.[7]

In 1950 Congress amended Section 7 to extend it to acquisitions of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that history reflects a continuing Congressional intent to fully exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading

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[7] At the time of the passage of the Clayton Act in 1914 the distinction between activities "in commerce" and activities "affecting commerce" had not been fully developed. The *Shreveport Rate Cases*, 234 U.S. 342, decided in 1914, has recognized Congress' power to regulate activities substantially affecting interstate commerce. The principles of the *Shreveport Rate Cases* were subsequently applied to the Sherman Act, passed in 1890. See *Mandeville Island Farms*, *supra*. Those principles are equally applicable to Section 7 of the Clayton Act.

congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected Congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Under the district court's restrictive interpretion of Section 7, a firm such as ABMI could obtain a virtual monopoly of a service industry, which is inherently local, by acquiring one local firm after another. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * * [H. Rep. No. 1191, 81st Cong., 1st Sess. 8.]

This Court has observed that the commerce requirement in every statute "presents a unique problem in which words derive vitality from the aim and nature of the specific legislation." *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 351.

In Section 7, as it stood after the Celler-Kefauver Amendments of 1950, 64 Stat. 1125, 1126, the commerce requirement was not stated separately. Instead, in a single comprehensive sentence the amended statute bars corporations "engaged in commerce" from acquiring the stock or assets "of another corporation engaged also in commerce", "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. The commerce requirement, therefore, was defined by the entire sentence. It should have been read by the district court in its total context rather than in isolation. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168.

It would indeed have been anomalous for Congress, which in 1950 strengthened Section 7 to prohibit in their incipiency anticompetitive practices before they developed into full-blown violations of the Sherman Act, not to have intended to exercise the same full reach of its commerce power that it had long since utilized in the Sherman Act itself. Otherwise, the congressional attempt to deal with these practices before they reached the stage of Sherman Act violations would have been seriously weakened.

2. This merger and acquisition had a substantial effect upon interstate commerce. Benton derived 80 percent to 90 percent of its revenues from customers who were engaged in selling goods in interstate and foreign commerce or in providing interstate communi-

cations facilities (Aff. of John D. Gaffey). Benton's services were an essential and important part of the interstate and international operations of those clients.[8]

Benton also purchased or leased substantial quantities of janitorial supplies and other goods which originated outside of California. Purchases of supplies originating in other states have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320; *United States* v. *Employing Plasterers Assoc.*, 347 U.S. 186.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
WILLIAM L. PATTON,
Assistant to the Solicitor General.
CARL D. LAWSON,
LEE I. WEINTRAUB,
Attorneys.

MAY 1974.

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[8] Affidavits cited in n. 2, *supra*. Even if Section 7 were deemed to require activities in the "flow of commerce", Benton's intimate involvement in the operations of its clients which were unquestionably engaged in interstate commerce satisfies such a restrictive test. Moreover, Benton engaged in a form of interstate sales activity by negotiating contracts with persons in other states and by soliciting contracts through the use of interstate facilities.

APPENDIX A

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF California

CIVIL ACTION NO. 71-55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, and it appearing that there is no genuine issue as to the facts hereinafter set forth, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Defendant American Building Maintenance Industries is, and at all times relevant to this action was,

a corporation organized under the laws of the State of California, having its principal office in San Francisco, California.

2. J. E. Benton Management Corporation, formerly named Pacific Realty Securities Company, was at all times relevant to this action a corporation organized under the laws of the State of California having its only office in Los Angeles, California.

3. On June 30, 1970 all of the stock of J. E. Benton Management Corporation was acquired by defendant.

4. Prior to June 30, 1970 and at all times relevant to this action, J. E. Benton Management Corporation engaged in the real estate business and the business of providing building management, janitorial and related services. These were the only businesses engaged in by J. E. Benton Management Corporation and they were conducted entirely within Los Angeles, Orange and Ventura Counties in California.

5. J. E. Benton Management Corporation had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how, and no location or business situs advantage.

6. Between March 1, 1970 and June 30, 1970 J. E. Benton Management Corporation made no purchases of products which were shipped to it from outside California.

7. Between March 1, 1969 and Febuary 28, 1970 J. E. Benton Management Corporation made no purchases of any product or services of any kind or character which were shipped to it from outside California except the following:

(a) Real estate publications costing $13.39 from Matthew Bender Company, Albany, New York;

(b) Reel rack costing $25.01 from Monarch Metal Products, New Windsor, New York;

(c) Income tax publication costing $79.98 from Prentice Hall, Inc., Englewood Cliffs, New Jersey; and

(d) Sign purchase costing $11.97 from Ready Made Sign Company, Long Island, New York.

These purchases do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

8. J. E. Benton Management Corporation did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

9. Benton Maintenance Company, formerly named S. W. Straus & Co. and Affiliated Maintenance Company, was at all times relevant to this action a corporation organized under the laws of the State of California, having its only office in Los Angeles, California.

10. On June 30, 1970 Benton Maintenance Company was merged into American Building Maintenance Company of California, a subsidiary corporation of defendant.

11. At all times relevant to this action Benton Maintenance Company was engaged in the business of providing janitorial and related services. This was the only business engaged in by Benton Maintenance Company and it was conducted entirely within Los Angeles, Orange and Ventura Counties in California.

12. Benton Maintenance Company had no manufacturing plant, no sales or distribution outlets, no product which was sold or shipped, no patents or scientific know-how and no location or business situs advantage.

13. Between January 1, 1969 and June 30, 1970 Benton Maintenance Company made no purchases of products which were shipped to it from outside California.

14. Benton Maintenance Company did not advertise nationally. It purchased advertising in the yellow pages of local telephone directories and distributed brochures describing its business to prospective customers.

15. J. E. Benton Management Corporation and Benton Maintenance Company received telephone services from The Pacific Telephone and Telegraph Company ("Pacific") over telephone number 737-3220 through a single switchboard at their offices located at 3727 West Olympic Boulevard, Los Angeles, California. From January 1969 through June 1970 Pacific billed J. E. Benton Management Corporation $18,310.70 for these services. Pacific was paid $18,260.45 on these bills of which $19.78 represented payment of charges for ten out-of-state calls apparently related to the business activities of the Benton corporations. These ten calls do not represent a substantial or appreciable amount of interstate commerce by any standard and are *de minimus*.

16. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.

17. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with its suppliers. There are no significant economies to be realized through

bulk or quantity purchases of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial service. The basic service provided was the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of total amounts paid by customers for janitorial services.

18. The major suppliers of the Benton corporations were:

(a) Ball Industries, El Segundo, California, which delivered industrial and janitorial equipment and supplies from its warehouse to the Benton corporations' warehouse at 3727 West Olympic Boulevard or to customer locations specified by the Benton corporations;

(b) National Sanitary Supply Co., Los Angeles, California, which delivered paper goods and other janitorial supplies from its warehouse to the Benton corporations' warehouse or to customer locations specified by the Benton corporations;

(c) U.S. Guards, Monterey Park, California, which provided the Benton corporations with building guard services on a subcontract basis; and

(d) Courtesy Chevrolet Leasing, Los Angeles, California, which leased vehicles to the Benton corporations.

19. Plaintiff United States of America does not allege in its complaint herein that the Benton corporations, or either of them, are engaged in commerce, nor does plaintiff allege that the effect of the acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in areas other than areas wholly within California.

20. The following Conclusions of Law, insofar as

they may be considered Findings of Fact, are so found to be true in all respects and are to that extent adopted by the Court as Findings of Fact.

Based upon the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

21. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

22. J. E. Benton Management Corporation was not a corporation engaged in commerce at the time of the acquisition of its stock by defendant.

23. Benton Maintenance Company was not a corporation engaged in commerce at the time of its merger into American Building Maintenance Company of California, a subsidiary corporation of defendant.

24. There is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act. (15 U.S.C. § 18.)

25. Plaintiff United States of America is not entitled to a judgment or a final decree or damages against defendant.

26. Defendant is entitled to a summary judgment in its favor dismissing this action and judgment of dismissal should be entered accordingly.

27. The foregoing Findings of Fact, insofar as they or any of them may be considered Conclusions of Law, are to that extent hereby adopted by the Court as Conclusions of Law.

Dated at Los Angeles, California, this 12th day of December, 1973.

JESSE W. CURTIS,
United States District Judge.

APPENDIX B

United States District Court, Central District of California

CIVIL ACTION NO. 71–55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

SUMMARY JUDGMENT OF DISMISSAL IN FAVOR OF DEFENDANT AMERICAN BUILDING MAINTENANCE INDUSTRIES AGAINST PLAINTIFF UNITED STATES OF AMERICA

The above entitled action came on regularly for hearing on September 4, 1973, before the Court, the Honorable Jesse W. Curtis, United States District Judge presiding, on the motion of defendant American Building Maintenance Industries for a summary judgment of dismissal for lack of federal jurisdiction against plaintiff United States of America, and said plaintiff and said defendant being represented by their respective counsel, and the Court having considered the pleadings and said motion and the papers filed in support thereof and other papers on file herein and the arguments of counsel, and being fully advised in the premises, the Court made its Findings of Fact and Conclusions of Law, and it appearing that there is no genuine issue as to any material fact and that said defendant is entitled to a judgment of dismissal as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment of dismissal be

entered in favor or defendant American Building Maintenance Company against plaintiff United States of America dismissing the above entitled action, and that said plaintiff take nothing on his complaint from defendant, and that said defendant have and recover its costs from said plaintiff in the sum of $.

Dated at Los Angeles, California this 12th day of December, 1973.

JESSE W. CURTIS,
United States District Judge.

United States District Court, Central District of California

CASE NO. 71–55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

NOTICE OF ENTRY

To the above named parties and to their attorneys of record:

You are hereby notified that Summary judgment of dismissal in favor of defendant American Building Maintenance Industries against plaintiff United States of America in the above entitled case was entered in the docket on December 12, 1973.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (*After* sixty days in cases in which the United States, its officers or

agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on December 12, 1973, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Lawler, Felin & Hall,
605 W. Olympic Blvd.,
Los Angeles, Calif.

Michael J. Dennis, Esq.,
Department of Justice.
Antitrust Div.
Los Angeles, Calif.

EDWARD M. KRITZMAN,
Clerk.

By JOE R. FLORES,
Deputy Clerk.

APPENDIX C

United States District Court, Central District of California

CIVIL NO. 71-55

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES, DEFENDANT

NOTICE OF APPEAL OF SUMMARY JUDGMENT OF DISMISSAL

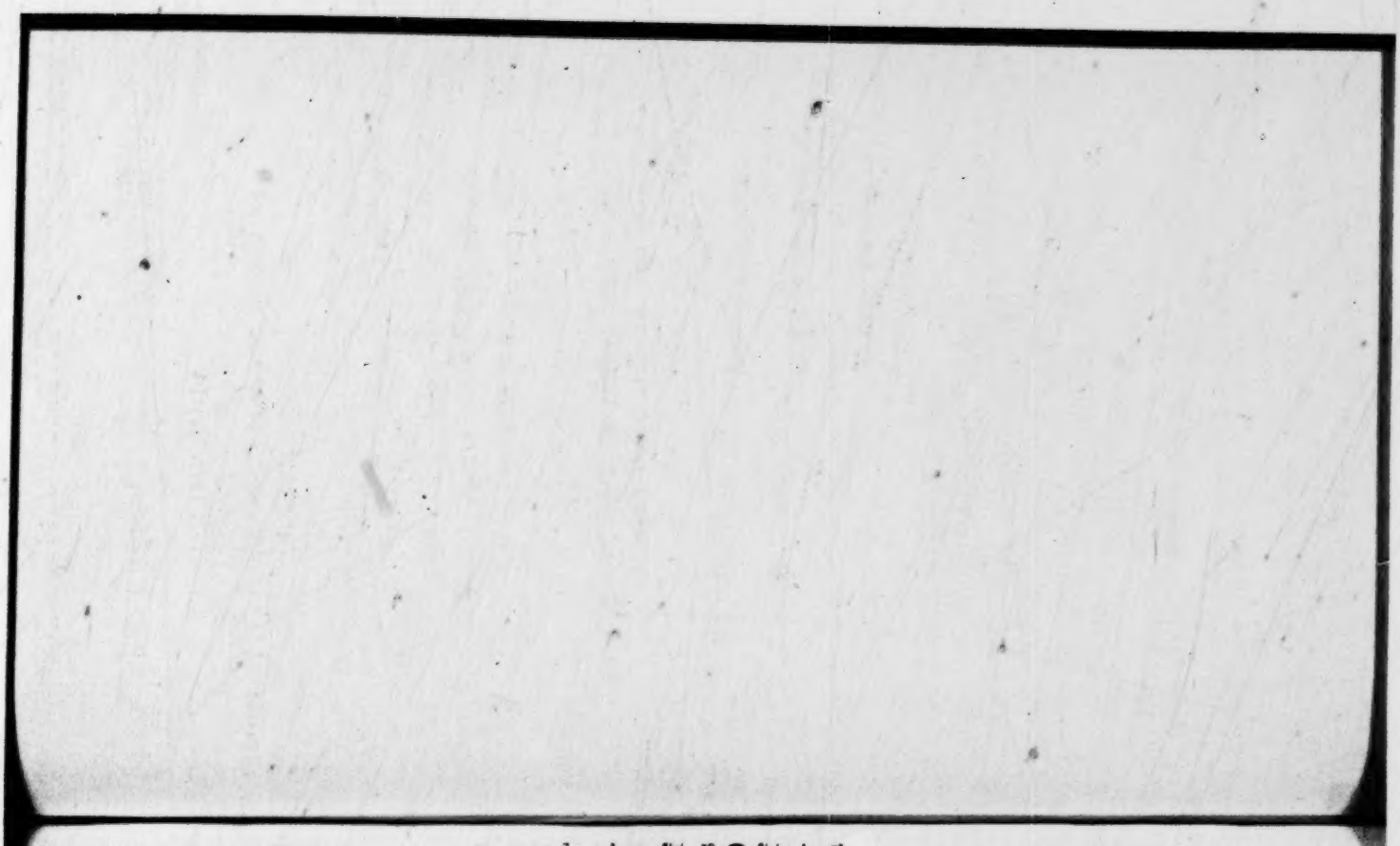
To: Defendant American Building Maintenance Industries and to its attorneys of record:

PLEASE TAKE NOTICE that the plaintiff United States of America appeals to the United States Supreme Court under the provisions of 15 U.S.C. § 29 the Summary Judgment of Dismissal in Favor of Defendant American Building Mainteniance Industries Against Plaintiff United States of America entered herein on December 12, 1973.

DATED FEBRUARY 6, 1974.

MICHAEL J. DENNIS,
Attorney, Department of Justice.

U.S. GOVERNMENT PRINTING OFFICE: 1974



TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Appellee moves the Court to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifest that there are no material disputed questions of fact and the questions of law as to which review is sought are, on their face, without substantial merit.

The Question Restated.

May a corporation engaged in rendering janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state, be deemed "engaged also in commerce" within that clause of Section 7 of the Clayton Act?

Statutes Involved.

Involved here is the phrase "engaged also in commerce" as it appears and is defined in the following

sections of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, as amended):

Section 7 (15 U.S.C. §18):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *"[1]

Section 1 (15 U.S.C. §12):

> " 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *"

Statement.

On January 8, 1971 this action was filed to assert the illegality of the June 30, 1970 acquisition by American Building Maintenance Industries ("ABMI") of J. E. Benton Management Corporation and Benton Maintenance Company ("Benton corporations"). The sole contention was that the acquisition violated Section 7 of the Clayton Act. Notwithstanding the explicit limitation in Section 7 that the acquired corporation must be "engaged also in commerce" before Section 7 can apply, the complaint failed to allege that the acquired corporations were so engaged. It is conceded that the acquired corporations operated only within the State of California.

Since the acquiring corporation (appellee ABMI) operates in a number of states, it is not controverted

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[1]Emphasis added herein unless otherwise noted.

that ABMI is "engaged in commerce." There is accordingly no issue relative to ABMI's activity, and the comments on that activity in the Jurisdictional Statement are plainly irrelevant.[2]

The court below on motion for summary judgment found that the acquired corporations were not "engaged also in commerce" and that accordingly the District Court lacked jurisdiction under Section 7 of the Clayton Act.[3] The Government makes no contention that there was any procedural impropriety in the presentation or the consideration of the motion for summary judgment or that the findings of fact are in any way erroneous. The Government disputes only the conclusions of law drawn from the findings of fact.

The findings of fact show:

1. Both Benton corporations (the acquired corporations) were engaged in the business of providing janitorial and related services. One of them, J. E. Benton Management Corporation ("Benton Management"), also engaged in the real estate and building management businesses. The Benton corporations conducted their businesses entirely within Los Angeles, Orange and Ventura Counties in California.[4]

2. The Benton corporations had no manufacturing plants, no sales or distribution outlets, no products

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[2]Appellee disputes the accuracy and completeness of the Government's characterization of the acquiring company in the Jurisdictional Statement. That characterization constitutes a thinly disguised effort to argue matters not properly germane.

[3]Findings 22 through 24 of the District Court's Findings of Fact and Conclusions of Law attached as Appendix A to the Jurisdictional Statement, hereinafter "Findings".

[4]Findings, 4 and 11.